the direct damage resulting from the payment of higher freight rates, which would be the difference between the higher and lower rates.[10]

On this point, however, the majority opinion seems to have employed the better reasoning, for in a case of discrimination by charging a lower rate than is lawfully required, it does not follow as a matter of law, that the shipper who pays the lawful and reasonable rate has been damaged to the extent of the benefit unlawfully conferred by the carrier upon the favored shipper; and consequently the difference between the rates charged cannot properly be made the measure of damages suffered. But in an action for money had and received, as distinguished from an action sounding in tort for damages, the injured shipper may recover the difference between the rates charged, on the theory of reparation for an unreasonable charge by the carrier, in violation of section 1 of the act.[11] It is immaterial that the complaining shipper was charged no more than the rate published as reasonable, for the carrier, having unlawfully conferred a benefit on one shipper, should not be heard to say that it would be unreasonable to compel him to deal on an equal basis with all those similarly situated.[12] In other words, the carrier has by his own unlawful act precluded himself from saying that the charge paid by the plaintiff was reasonable.[13] The complaint in the principal case contained a count evidently based on this theory, and on this count the plaintiff might well have been allowed to recover the amount charged, measured by the difference in rates.

POWER OF MUNICIPALITY TO EXCEED DEBT LIMIT.—In the application of the constitutional and statutory limitations which have been placed on the powers of municipalities to contract debts, the courts are in hopeless conflict. It is of utmost importance to investors to under-

[10]The dissenting opinion also points out that if this view were adopted, a great number of practical difficulties would be obviated. To prove actual damage from the discrimination in favor of plaintiff's competitor compels both the court and the injured shipper to inquire into the "state of the market and ascertain whether upon the precise date that the goods of the injured party reached the market, goods of like character owned by the favored shipper came into direct competition with them." In many cases the injured shipper would undoubtedly rest content with the difference between the rates charged rather than undertake to establish that he had really suffered a greater amount of damage.

[11]See Poor Grain Co. *v.* Chic. B. & Q. Ry. (1907) 12 Int. Com. Rep. 418. For a violation of § 4 of the act, prohibiting discrimination between long and short haul rates, the excess rate may also be recovered. Junod *v.* Chicago & N. W. Ry. (C. C. 1891) 47 Fed. 290.

[12]Even though the increased rate may have been borne ultimately by the purchaser of the goods and not by the shipper, the carrier, having unlawfully extorted it from the shipper, should not be permitted to retain it. See Burgess *v.* Transcontinental Freight Bureau (1908) 13 Int. Com. Rep. 668.

[13]See Messenger *v.* Pennsylvania R. R. (1873) 36 N. J. L. 407, 411. The English courts allow a recovery, in an action for money had and received, of the difference in rates, when there has been a discrimination in violation of § 90 of the Railway Clauses Consolidation Act, 8 & 9 Vict., ch. 20. Great Western Ry. *v.* Sutton (1869) L. R. 4 Eng. & Ir. App. 226. In considering this point in the principal case Mr. Justice Pitney in his dissenting opinion uses the term "estoppel."

stand what are the classes of municipal obligations against which the courts enforce these debt-limiting laws, for debts incurred by municipalities in excess of the limit are void; and the creditor has no remedy, except in the infrequent cases where he may invoke an estoppel.[1] The purpose of these limitations is to protect the present and future generations of tax-payers from the burdens of undue extravagance.[2] Therefore, although many courts, out of sympathy for the municipalities which might be seriously handicapped by a strict enforcement of the limitations, have narrowed the operation of the law to a very small class of debts,[3] it seems better to handicap the municipality by enforcing the law according to its terms than to oppress the taxpayers by sanctioning the evasion of the law.[4]

By making a distinction between obligations undertaken voluntarily by the municipality and obligations imposed by law, the majority of courts allow cities to exceed their debt limits in order to meet necessary current expenses.[5] It is difficult to see the reason for this distinction, in view of the fact that all municipal debts are the creatures of law, inasmuch as they are incurred in the execution of the powers which the constitution or statute confers upon the municipality.[6] So in a few jurisdictions it has been held that when the debt limit has been reached, the city must proceed on a cash basis even for current expenses.[7]

One method of avoiding the operation of the limitation is by incurring debts which are to be paid out of the proceeds of taxes already levied for the current year.[8] This is generally upheld by the courts on the theory that it is an assignment of money already due. This scheme, however, has been severely criticized by some courts;[9] and even the courts which sustain it admit that it may be extended so as to render the debt limit nugatory.[10]

In most jurisdictions it is held that if a municipality borrows

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[1]Eddy Valve Co. *v.* Crown Point (1906) 166 Ind. 613; Buchanan *v.* Litchfield (1880) 102 U. S. 278; 13 Columbia Law Rev. 152.

[2]1 Dillon, Municipal Corporations (5th ed.) § 191.

[3]City of Valparaiso *v.* Gardner (1884) 97 Ind. 1, 5; Swanson *v.* City of Ottumwa (1902) 118 Iowa 161, 170.

[4]Brix *v.* Clatsop County (1905) 46 Ore. 223, 232; City of Ottumwa *v.* City Water Supply Co. (C. C. A. 1902) 119 Fed. 315; Lake County *v.* Rollins (1889) 130 U. S. 662.

[5]Rauch *v.* Chapman (1897) 16 Wash. 568; see Gubner *v.* McClellan (N. Y. 1909) 130 App. Div. 716, 731. This reasoning can be extended to obligations for any authorized activity. Gladwin *v.* Ames (1903) 30 Wash. 608; see Rauch *v.* Chapman, *supra;* Smith *v.* Dedham (1887) 144 Mass. 177.

[6]See Barnard & Co. *v.* Knox County (1891) 105 Mo. 382; Fritsch *v.* Board of Comm'rs. (1897) 15 Utah 83, 93.

[7]Prince *v.* Quincy (1889) 128 Ill. 443; Logansport *v.* Jordan (1908) 171 Ind. 121; see Lake County *v.* Rollins, *supra.*

[8]Fuller *v.* Heath (1878) 89 Ill. 296; see Swanson *v.* City of Ottumwa, *supra,* p. 172. In some states this is allowed by provisions of the constitution. Const. of N. Y., Art. 8, § 10; see Blood *v.* Beal (1906) 100 Me. 30.

[9]City of Ottumwa *v.* City Water Supply Co., *supra.*

[10]French *v.* City of Burlington (1876) 42 Ia. 614, 618; see Swanson *v.* City of Ottumwa, *supra,* and the dissenting opinion in East Moline *v.* Pope (1906) 224 Ill. 386, 394.

money by mortgaging some of its property a debt is created, even though the creditor's remedy is confined to the mortgaged property.[11] But where a city purchases an equity of redemption, some states hold that this is not a debt, because the city can avoid payment by abandoning the property.[12] This argument assumes that a debt denotes not only an obligation of the debtor, but also the right of the creditor to enforce payment.[13] The weight of authority is opposed to this view, and holds that since the city must either pay or lose its property, it is indebted.[14]

Probably the most frequent plan adopted by municipalities to evade the debt limit is by the creation of obligations payable only out of a fund which is to be derived from a special tax[15] or assessment.[16] Since these funds never reach the general treasury of the city, it is argued that the city is merely a trustee for the obligees, and is not indebted for the amount collected. This contention, however, overlooks the fact that no practical distinction can be made between the direct liability of the city to pay the obligation out of its general revenue, and the indirect liability of the taxpayers to pay through the special fund; in either case the taxpayer is equally burdened.[17] This objection is obviated when the tax or assessment is levied with the consent of the taxpayers, as is usually the case. But even then, the courts should not allow the city to make these obligations payable in such a manner as to violate the spirit of the law by casting the burden upon future generations of taxpayers.

In computing a municipality's indebtedness, the majority of courts permit the amount of cash in the treasury to be deducted from the

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[11]Mayor of Baltimore *v.* Gill (1869) 31 Md. 375; Joliet *v.* Alexander (1902) 194 Ill. 457; *contra,* Swanson *v.* City of Ottumwa, *supra,* a purchase money mortgage covering only the property purchased.

[12]Connor *v.* City of Marshfield (1906) 128 Wis. 280.

[13]Burnham *v.* Milwaukee (1897) 98 Wis. 128.

[14]Joliet *v.* Alexander, *supra;* Eddy Valve Co. *v.* Crown Point, *supra;* Browne *v.* Boston (1901) 179 Mass. 321. Where a city contracts for a supply of water, light or other necessary service to be supplied for a term of years, and paid for as furnished, some courts hold that this creates a debt for the aggregate of all such future payments, because the city cannot escape liability except by the failure of the other party to render the services. Beard *v.* Hopkinsville (1894) 95 Ky. 239; City of Chicago *v.* McDonald (1898) 176 Ill. 404. But by the weight of authority this is not considered a debt, but is a contract for future indebtedness, to be incurred providing the contracting party performs the agreement. See Voss *v.* Waterloo Water Co. (1904) 163 Ind. 69; Walla Walla *v.* Walla Walla Water Co. (1898) 172 U. S. 1, 19; Allison *v.* City of Chester (1911) 69 W. Va. 533.

[15]Swanson *v.* City of Ottumwa, *supra.*

[16]Addyston Co. *v.* City of Corry (1900) 197 Pa. 41. If a city purchases a profitable business, and the vendor agrees to look to the proceeds of the business for payment, clearly this is not a debt within the prohibition. 13 Columbia Law Rev. 443.

[17]Brix *v.* Clatsop County, *supra.* Even where the city derives the special fund from the receipts of a profitable business, it should not be allowed to violate the spirit of the law by charging the consumers exorbitant rates. See Feil *v.* City of Cœur d'Alene (Idaho 1913) 129 Pac. 643.

aggregate indebtedness.[18] In Washington, this doctrine has been extended to permit deduction not only of the amount of cash on hand, but also the amount of uncollected current and delinquent taxes, under the theory that in legal contemplation the collection of these taxes is certain.[19] In the recent case of *State Capitol Commission* v. *State Board of Finance* (Wash. 1913) 132 Pac. 861, the court refused to sanction a further extension of this rule to the deduction of the appraised value of some state lands which were pledged to the satisfaction of the debt.

ABSOLUTE LIABILITY OF AUTOMOBILE OWNERS.—In the recent case of *Daugherty* v. *Thomas* (Mich. 1913) 140 N. W. 615, the court was called upon to determine the validity of a statute which provided that the owner of an automobile should be liable for all injuries occasioned by the negligent operation thereof except where it had been stolen; and it was held that since the statute made the owner liable for injuries caused by the negligent operation of the automobile by a mere stranger or wilful trespasser, without reference to the care exercised by the owner, it deprived the owner of his property without due process of law. If the end sought to be attained by the legislature had been merely to compensate those injured by the negligent operation of automobiles, it would seem that this result could have been reached by levying an assessment upon automobile owners, and providing for the indemnification of all the victims of automobile accidents out of the fund so raised. Such a statute would be almost identical with the one which was under review in *Noble State Bank* v. *Haskell*.[1] But, on the other hand, if the purpose of the legislature was to secure the careful operation of automobiles for the protection of the public on the highways, the imposition of such an assessment, it would seem, would have no tendency to produce this result, since whether an owner met with any accident or not, he would still have to contribute to the fund.

The real purpose of the statute in the principal case, however, seems to be to regulate the operation of automobiles to prevent injury to those using the public highways. The constitutionality of the statute depends therefore upon whether the danger to those using the highways because of the negligent operation of automobiles is so great that the imposition upon automobile owners of an absolute liability for all injuries caused by the negligent operation of their machines is a means reasonably suited to attain the end sought. That the danger to which those using the highways are exposed by the operation of automobiles would not warrant the imposition upon automobile own-

[18]Graham *v.* Spokane (1898) 19 Wash. 447; Eau Claire *v.* Eau Claire Water Supply Co. (1909) 137 Wis. 517, 536. Some courts refuse to allow this reduction for the sound reason that whether a party is in debt does not depend on his net worth. City Water Supply Co. *v.* City of Ottumwa (C. C. 1903) 120 Fed. 309, 313; Chicago *v.* McDonald, *supra*, p. 416. In New York, only the municipal funds on hand and set apart to meet some specific indebtedness may be deducted, Kronsbein *v.* City of Rochester (N. Y. 1902) 76 App. Div. 494.

[19]Graham *v.* Spokane, *supra*.

[1](1911) 219 U. S. 104; and see State *ex rel.* Davis-Smith Co. *v.* Clausen (1911) 65 Wash. 156; McGlone *v.* Womack *et al.* (Ky. 1908) 111 S. W. 688, 17 L. R. A. [N. S.] 855, and note; 10 Columbia Law Rev. 55.